

JOINT COMMITTEE ON ADMINISTRATIVE RULES

ILLINOIS GENERAL ASSEMBLY

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REP. LOU LANG
REP. DAVID R. LEITCH
REP. DAVID MILLER
REP. ROSEMARY MULLIGAN

MINUTES

May 20, 2008

MEETING CALLED TO ORDER

The Joint Committee on Administrative Rules met on May 20, 2008 at 8:00 a.m. in Room A-1 of the Stratton Office Building in Springfield IL.

Co-Chair Hassert announced that the policy of the Committee is to allow only representatives of State agencies to testify orally on any rule under consideration at Committee hearings. Other persons are encouraged to submit their comments in writing.

ATTENDANCE ROLL CALL

X Senator Bradley Burzynski	Representative John Fritchey
Senator James Clayborne, Jr.	X Representative Brent Hassert
X Senator Maggie Crotty	X Representative Lou Lang
X Senator Randy Hultgren	X Representative David Leitch
X Senator Dan Rutherford	X Representative David Miller
Senator Ira Silverstein	X Representative Rosemary Mulligan

APPROVAL OF THE MINUTES OF THE PREVIOUS JCAR MEETING

Senator Crotty moved, seconded by Senator Rutherford, to approve the minutes of the April 15, 2008 meeting. The motion passed unanimously.

ANNOUNCEMENT

Co-Chair Hassert announced that Tab 16, Department of Healthcare and Family Services, would be removed from the May agenda and added to the June agenda.

REVIEW OF AGENCY RULEMAKINGS

Department of Revenue – Lottery (General) (11 Ill. Adm. Code 1770; 32 Ill. Reg. 1071)

Senator Burzynski moved, seconded by Representative Leitch, that JCAR recommend that, in the future, the Department of Revenue refrain from implementing policy not in rule. The Illinois Lottery has been operating a self-exclusion program since October 2007 without statutorily required rules. The motion passed unanimously.

Illinois Student Assistance Commission – Illinois Future Teacher Corps (IFTC) Program (23 Ill. Adm. Code 2764; 32 Ill. Reg. 1858)

Representative Lang moved, seconded by Representative Miller, that JCAR and the Illinois Student Assistance Commission agree to extend the 2nd Notice period for the rulemaking for an additional 45 days. The motion passed unanimously.

Department of Healthcare and Family Services – Medical Assistance Programs (89 Ill. Adm. Code 120; 32 Ill. Reg. 7212) (Peremptory)

Senator Rutherford moved, seconded by Representative Lang, that JCAR object to the Department's use of peremptory rulemaking to adopt these rules and suspend the rules because that use of peremptory rulemaking violates Section 5-50 of the IAPA, which allows peremptory rulemaking to be used only when rulemaking is required as a result of federal law, federal rules and regulations, an order of a court or a collective bargaining agreement that precludes the exercise of agency discretion as to the content of the rule and that precludes adoption of rules through regular rulemaking. The analysis portion of the court's Memorandum Opinion and Order entered in *Caro vs. Blagojevich* on 4/15/08, which HFS cites as the reason for this peremptory rulemaking, notes that not all TANF requirements are met by the expanded FamilyCare Program emergency rules, specifically the requirement that adults in the household be employed or engaged in a job search. However, the judge's specific order on 4/15/08 preliminarily enjoins HFS from "enforcing the Emergency Rules or expending any public funds related to the FamilyCare Program created by the Emergency Rule". The court order does not direct HFS to amend its rules in any way, including insertion of employment and job search requirements, nor does the court set any deadline for action that precludes the use of regular rulemaking procedures. Therefore, the standards under Section 5-50 of the IAPA for use of peremptory rulemaking are not met, and JCAR finds this violation of the IAPA presents a threat to the public interest.

The Department was represented by Tamara Hoffman, Chief of Staff; Kyong Lee, Acting General Counsel; and Jacqui Ellinger, Deputy Administrator of Medical Programs.

Representative Mulligan asked the Department to explain why it thinks the court order requires rulemaking.

Ms Hoffman: The Department has interpreted the court order as requiring these rules.

Representative Mulligan: Does the Department believe the rule covers those persons who HFS has added through expanded FamilyCare or those who were formerly covered by the SCHIP waiver?

Ms Hoffman: The Department believes it will affect all participants in the medical assistance program.

Representative Mulligan asked to be updated on the Department's progress in seeking federal coverage for those formerly covered under the SCHIP waiver.

Ms Ellinger: A federal waiver is not required to get federal matching funds under Title XIX; a State Plan amendment is required. HFS has been negotiating a State Plan amendment for this purpose with CMMS since December 2007. HFS is expecting to receive approval.

Representative Mulligan: Does HFS expect the approval to apply retroactively to the 9/30/07 expiration of the waiver?

Ms Ellinger: Federal law allows approved amendments to be effective for the entire quarter in which filed, in this case, starting 10/1/07. In the State Plan amendment under consideration, HFS asked for matching funds for parents of SCHIP participants with incomes up to 200% FPL.

Representative Mulligan: Wasn't the cap 185% during the period of the waiver?

Ms Ellinger agreed, stating that HFS had expanded, under the suspended emergency rule, to 400%.

Representative Mulligan said her concern is for those covered under the previous program, those up to 185% FPL, and whether Illinois would be getting matching federal funds for them, or what it would cost the State to cover them without federal approval for additional matching funds.

Ms Ellinger could only say that HFS expects federal matching funds to be approved for that population.

Representative Mulligan: Can coverage be extended to this population without any further changes in rule?

Ms Ellinger: HFS operates under federal law and State law. Under State law, it filed rule changes. Under federal law, it filed the State Plan amendment.

Representative Mulligan pointed out that the rule change was a little more expansive than the State Plan amendment Ms Ellinger is describing. She stated again that her concern is those formerly covered under the SCHIP amendment.

Ms Hoffman: HFS is cautiously optimistic the amendment will be approved.

Representative Lang stated that his concern is not about the substance of the rule, but about the use of peremptory rulemaking. JCARE has taken action against what it has judged to be unauthorized emergency rulemaking; now the Department is trying peremptory rulemaking. He asked on what statutory authority HFS relied in choosing to use peremptory rulemaking.

Ms Hoffman stated that HFS was relying on the authority to use peremptory rulemaking to implement a court order. She understands that JCAR does not agree.

Representative Lang: Has HFS staff read the statute authorizing peremptory rulemaking?

Ms Hoffman indicated she had.

Representative Lang: Was there anything in the court order that required rulemaking?

Ms Hoffman: We believe yes, because the judge included TANF requirements.

Representative Lang asked HFS staff to read the section in the court order that it believes required peremptory rulemaking.

Ms Hoffman: There may not be express language, but we believe that the way it is written required us to do so. That could be a matter of interpretation.

Representative Lang: There is no interpretation. The statute says you can use peremptory rulemaking when "ordered" to do so by a court. Please read the language in the court order that required you to adopt rules.

Ms Hoffman: Our acting general counsel informs me that is our interpretation.

Representative Lang: Again, please read the section of the court order that requires you to adopt rules.

Ms Hoffman: We believe that it can be inferred from the court order.

Representative Lang: I'm not giving up. Read the language to this Committee.

Ms Hoffman: We are looking, sir.

Representative Lang: Thank you. I have time.

Representative Hassert: Representative Mulligan, while they are looking...for a brief question.

Representative Mulligan: Is this a temporary restraining order?

Ms Hoffman: Preliminary injunction.

Representative Mulligan: Do you have to show the court some substantive remedy to the court's issues in order to have the injunction changed?

Ms Hoffman: Our acting general counsel says yes.

Representative Mulligan: Would this change in rule be considered your remedy?

Mr. Lee: We don't mean to be argumentative. This is our inference based on our interpretation of the court order. We believe the judge is requiring these changes with respect to TANF.

Representative Lang: Where in the statute authorizing peremptory rulemaking does it refer to interpretation? It says "when ordered to do so by a court". Were you ordered to do so?

Ms Hoffman: Yes, we have a court order, and we believe that the inference in the court order requires us to do this.

Representative Lang: I have been waiting for a few minutes now for you to read that section to me.

Mr. Lee offered to read the entire Memorandum of Opinion and Order.

Ms Hoffman: Is it upon the consideration of the entire body of the court order?

Representative Lang: I have no idea what you just said. I don't want you to read the entire Memorandum of Opinion and Order. Read the language in the actual order that requires you to adopt this rule. [No response from HFS staff.] Never mind, don't read it. You started by saying that it is an "inference". You started by saying you weren't really "ordered". You started by saying you have an "interpretation" that requires you to do this. My view is that you are in violation of the statute. Regardless of whether the resulting rule provision makes sense, we have a body of laws and rules in this State we must follow. I for one am not going to allow the Administration to use peremptory rulemaking without adhering to the statutory restrictions on that process.

The motion passed on a vote of 8-0-1 (Present: Mulligan).

Representative Mulligan explained her Present vote by stating that she believes this argument is detrimental to the people of the State.

Department of Healthcare and Family Services – Medical Payment (89 Ill. Adm. Code 140; 32 Ill. Reg. 6743) (Peremptory)

Representative Leitch, seconded by Senator Burzynski, moved that JCAR object to the Department's use of peremptory rulemaking and suspend the rule because this use of peremptory rulemaking violates Section 5-50 of the IAPA, which allows peremptory rulemaking to be used when rulemaking is required as a result of federal law that precludes the exercise of agency discretion as to the content of the rule and that precludes use of general rulemaking procedures under Section 5-40 of the IAPA. Both the underlying federal statute and the guidance document issued by CMMS in August 2007 allow for state discretion in regulating the use of tamper-resistant prescription pads. Additionally, since the agency has known since 9/29/07 that it had until 3/31/08 to implement this program, it had the opportunity to do so through the regular rulemaking process. The peremptory rules' inclusion of provisions not related to the federal action doubly violates peremptory rulemaking authority. This unauthorized use of peremptory

rulemaking presents a threat to the public interest.

The motion passed on a vote of 9-0-0.

Violence Prevention Authority – Public Information, Rulemaking and Organization (2 Ill. Adm. Code 1770; 32 Ill. Reg. 7417) (Adopted)

Senator Hultgren, seconded by Representative Mulligan, moved that JCAR object to the adopted rules because they will apparently lead to the Authority following policy not in rule. Section 1770.300 of the rule states that VPA's rulemaking authority is limited to a description of the organization, procedures for handling public information requests, and a description of its procedures for adopting and amending these required organizational rules. JCAR does not agree. The IAPA grants rulemaking authority and responsibilities to all State agencies as defined in that Act, which includes statutorily created Authorities. Under the Violence Prevention Act of 1995, VPA allocates funds and makes grants from available appropriations and other private, State or federal funds to community and statewide organizations. If it fails to adopt rules governing application procedures, award criteria, etc., VPA would be disregarding the IAPA requirement that policy affecting an entity outside the agency be adopted and implemented through rules. Further, if VPA is exercising any discretion in disbursing these funds, such as denying any applicant or varying the amount of grants, Section 5-20 of the IAPA requires agency rules to establish standards by which the agency exercises its discretionary powers. Finally, the rule states that the requestor will be notified concerning the cost of copying records, which again suggests the agency intends to enforce policy not in rule. Fees being charged by an agency should be stated in rule. Further, JCAR recommended that the Authority propose rules governing its grant procedures within the next 3 months.

Senator Rutherford: The point is that the Authority is handing out taxpayer monies with no written standards, no written rules and no written procedures that give the public an assurance of fairness. The goal of your program is wonderful. Our concern is the process you go through in making your awards. We are requesting that you reflect that process in rule within the next 3 months. Sunlight is good in government, especially when you are awarding taxpayer dollars.

Representative Mulligan: I suggest the rules govern what percentage of funds can be used for administrative purposes and what percentage must be used for actual programs. I was one of the sponsors of the underlying legislation and I don't believe it was the intent that you distribute these funds without rules governing your activities.

The motion passed unanimously.

Co-Chair Hassert asked if any member wished to discuss any other rulemakings. Members requested consideration of rulemakings of the Departments of Healthcare and Family Services and Natural Resources.

Department of Healthcare and Family Services – Reimbursement for Nursing Costs for Geriatric Facilities (89 Ill. Adm. Code 147; 32 Ill. Reg. 300)

Tamara Hoffman, Chief of Staff, and Theresa Eagleson, Medicaid Administrator, appeared on behalf of the Department.

Representative Lang commented that he had noticed that several public commentators had problems with parts of the rulemaking. He asked the Department to elaborate.

Ms Eagleson said that HFS made a few changes in this rulemaking in response to public comment. The main commentators were the major nursing home associations. The reimbursement methodology for ventilator-dependent persons in nursing homes was changed, and various other small issues were addressed.

Representative Lang asked if the commentators have expressed any ongoing concerns.

Ms Eagleson indicated she had heard of none.

Senator Rutherford asked whether the industry's concerns with onerous recordkeeping and reporting requirements had been addressed.

Ms Eagleson said that was a timing issue. The industry didn't believe it could implement the requirements under the short time frames created by use of emergency rulemaking, but no concerns have been mentioned in regard to this proposed rulemaking.

No further action was taken.

Department of Natural Resources – Camping on Department of Natural Resources Properties (17 Ill. Adm. Code 130; 32 Ill. Reg. 2653)

Department of Natural Resources – White-Tailed Deer Hunting by Use of Firearms (17 Ill. Adm. Code 650; 32 Ill. Reg. 2662)

Department of Natural Resources – White-Tailed Deer Hunting by Use of Bow and Arrow (17 Ill. Adm. Code 670; 32 Ill. Reg. 2699)

Jack Price, attorney, represented the Department of Natural Resources.

Senator Rutherford stated that these rulemakings would increase the cost of camping in State parks and of deer hunting by out-of-state residents. He asked if these increased revenues would be protected from sweeps of special funds that could divert this revenue to other State government programs.

Mr. Price indicated that the State Parks Fund and the Wildlife and Fish Fund are protected from sweeps if the State takes U.S. Fish and Wildlife Service funds. If the FWS ruling is violated, the State would have to return its federal funds.

Senator Burzynski asked how the amount of increase in camping fees was determined, and how these fees compare to those of private campgrounds.

Mr. Price said these fees would still be lower than most of the private fees. Much of the increase is attributable to increases in utility costs. The utility fees being paid now don't cover the cost of utility service and maintenance on electric lines and water mains. Camping and utility fees go back into maintenance of campgrounds. The other increase is in the camping fee for prime holiday weekends. For example, every available premium site has been reserved for the Memorial Day weekend for some time. The fee increase is designed to cover some of the costs of repairing damage to the state parks from that extra-heavy usage.

Senator Burzynski asked what kinds of budget increases DNR has received in the past few years. He stated that he normally is in favor of user fees, but in this case, he believes the increase will make it difficult for families to use the State parks, particularly when coupled with escalating gas prices.

Mr. Price agreed that any time there is a fee increase, usage drops, but indicated that the utility bills do have to be paid. For those who don't need electricity and water on their campsites, there are plenty of sites available and fees for those sites are not being increased.

Representative Leitch stated that this issue involves more than user fees. According to the Governor's budget, GRF will be removed from Wildlife Prairie State Park, for example, and replaced with increased fee income. So how can you say these are strictly user fees?

Mr. Price pointed out that DNR does not decide how much GRF will be available to it, nor was it DNR's choice to accept the Wildlife Prairie State Park. It was turned down for 10 years before a previous governor required DNR to accept it. DNR is just trying to work with what it's got. If DNR can't pay the electric bill, the campers don't get electricity.

Representative Leitch stated that DNR is increasing fees to support State facilities, according to the budget.

Mr. Price said he hadn't seen the budget, but he believes the Representative is correct in stating that DNR is to receive less GRF.

Representative Leitch said he is simply pointing out that Mr. Price's statement that these fees are to be used solely to keep the lights on is incorrect.

Mr. Price agreed that only one of the fee increases is about the cost of utilities. The increased camping fee for holiday weekends will generally be used for park maintenance.

Representative Lang agreed that these fees are outrageous and high, but stated that he believes DNR has the authority to set the fees.

Mr. Price indicated he also is not fond of the increases.

No further action was taken.

CERTIFICATION OF NO OBJECTION

Representative Lang moved, seconded by Senator Crotty, that the Committee inform the agencies to whose rulemakings the Committee did not vote an Objection, or did not remove from the No Objection List, that the Committee considered their respective rulemakings at the monthly meeting and, based upon the Agreements for modification of the rulemakings made by the agencies, no Objections will be issued.

The motion passed unanimously, except that Senators Burzynski and Rutherford and Representative Leitch voted No on rulemakings of the Department of Natural Resources titled Camping on Department of Natural Resources Properties (17 Ill. Adm. Code 130; 32 Ill. Reg. 2653), White-Tailed Deer Hunting by Use of Firearms (17 Ill. Adm. Code 650; 32 Ill. Reg. 2662) and White-Tailed Deer Hunting by Use of Bow and Arrow (17 Ill. Adm. Code 670; 32 Ill. Reg. 2699).

AGENCY RESPONSES

Healthcare and Family Services – Medical Payment (89 Ill. Adm. Code 140; 31 Ill. Reg. 13570)

Senator Burzynski, seconded by Representative Mulligan, moved that JCAR publish a Notice of Failure to Remedy. The motion passed unanimously.

Healthcare and Family Services – Hospital Services (89 Ill. Adm. Code 148; 32 Ill. Reg. 518) (Emergency) and Hospital Reimbursement Changes (89 Ill. Adm. Code 152; 32 Ill. Reg. 529) (Emergency)

Representative Lang, seconded by Senator Rutherford, moved that JCAR publish a Notice of Failure to Remedy. The motion passed unanimously.

Department of Public Health – Smoke Free Illinois Code (77 Ill. Adm. Code 975; 31 Ill. Reg. 13672)

No action was taken, pending DPH's presentation of proposed modifications to JCAR.

Secretary of State – Department of Personnel (80 Ill. Adm. Code 420; 32 Ill. Reg. 3013) (Emergency)

Based on the appropriateness of the Secretary's response, no further action was taken.

Commerce Commission – Organization and Public Information (2 Ill. Adm. Code 1700; 31 Ill. Reg. 16734) (Adopted)

Based on the appropriateness of ICC's response, no further action was taken at this time. Staff will monitor.

JUNE MEETING DATE

Co-Chair Hassert announced that the next monthly meeting is scheduled for Tuesday, June 17, 2008, 10:30 a.m., Room 16-503 of the James R. Thompson Center in Chicago.

ADJOURNMENT

Representative Leitch moved, seconded by Senator Burzynski, that the meeting be adjourned. The motion passed unanimously and the meeting was adjourned.

Min:0805May